

536 U.S. 765, \*; 122 S. Ct. 2528, \*\*;  
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partisan elections. *Ibid.* Most of the States that do not have any form of judicial elections choose judges through executive nomination and legislative confirmation. See Croley, *supra*, at 725.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

JUSTICE KENNEDY, concurring.

I agree with the Court that Minnesota's prohibition on judicial candidates' announcing their legal views [\*\*\*716] is an unconstitutional abridgment of the freedom of speech. There is authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases, see, *e.g.*, *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991), and the Court explains in clear and forceful terms why the Minnesota regulatory scheme fails that test. So I join its opinion. [\*793]

I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." *Id.*, at 124 (KENNEDY, J., concurring in judgment). The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Here, Minnesota has sought to justify its speech restriction as one necessary to maintain the integrity of its judiciary. Nothing in the Court's opinion should be read to cast doubt on the vital importance of this state interest. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and

the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Articulated standards of judicial conduct may advance this interest. See Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 *Geo. J. Legal Ethics* 1059 (1996). To comprehend, then to codify, the essence of judicial integrity is a hard task, however. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe [\*794] the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, [\*\*2545] *The Nature of the Judicial Process* 9 (1921). Much the same can be said of explicit standards to ensure judicial integrity. To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt. Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service. See, *e.g.*, *Administrative Office of U.S. Courts, Code of Judicial Conduct for United States Judges* [\*\*\*717] (1999). Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.

Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State. See *Brown v. Hartlage*, 456 U.S. 45, 60, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982). The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.

The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to [\*795] cure this tendency

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with governmental restrictions on political speech. See Sedition Act of 1798, ch. 74, 1 Stat. 596. Cooler heads have always recognized, however, that these measures abridge the freedom of speech -- not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are "expressly and positively forbidden by" the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 274, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (quoting the Virginia Resolutions of 1798). The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the federal judiciary. In resolving this case, however, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this [\*2546] mechanism [\*\*\*718] rather than, say, appointment and confirmation. [\*796] By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity. We should not, even by inadvertence, "impute to judges a lack of firmness, wisdom, or honor." *Bridges v. California*, 314 U.S. 252, 273, 86 L. Ed. 192, 62 S. Ct. 190 (1941).

These considerations serve but to reinforce the conclusion that Minnesota's regulatory scheme is flawed. By abridging speech based on its content, Minnesota impeaches its own system of free and open elections. The State may not regulate the content of candidate

speech merely because the speakers are candidates. This case does not present the question whether a State may restrict the speech of judges because they are judges -- for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), could be extended to allow a general speech restriction on sitting judges -- regardless of whether they are campaigning -- in order to promote the efficient administration of justice, is not an issue raised here.

Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner. Even the undoubted interest of the State in the excellence of its judiciary does not allow it to restrain candidate speech by reason of its content. Minnesota's attempt to regulate campaign speech is impermissible.

#### DISSENTBY: STEVENS; GINSBURG

#### DISSENT:

[\*797] JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In her dissenting opinion, JUSTICE GINSBURG has cogently explained why the Court's holding is unsound. I therefore join her opinion without reservation. I add these comments to emphasize the force of her arguments and to explain why I find the Court's reasoning even more troubling than its holding. The limits of the Court's holding are evident: Even if the Minnesota Lawyers Professional Responsibility Board (Board) may not sanction a judicial candidate for announcing his views on issues likely to come before him, it may surely advise the electorate that such announcements demonstrate the speaker's unfitness for judicial office. If the solution to harmful speech must be more speech, so be it. The Court's reasoning, however, will unfortunately endure beyond the next election cycle. By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.

[\*\*719] The Court's disposition rests on two seriously flawed premises -- an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom "to express themselves on matters of current public importance" as do all other elected officials. *Ante*, at 29. Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact [\*\*2547] does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries. [\*798]

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. Sir Matthew Hale pointedly described this essential attribute of the judicial office in words which have retained their integrity for centuries:

"11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.

"12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice." n1

n1 2 J. Campbell, *Lives of the Chief Justices of England* 208 (1873) (quoting Hale's *Rules For His Judicial Guidance*, *Things Necessary to be Continually Had in Remembrance*).

Consistent with that fundamental attribute of the office, countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them. It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections. For this reason, opinions that a lawyer may have expressed before becoming a judge, or a judicial candidate, do not disqualify anyone for judicial service because every good judge is fully aware of the distinction between the law and a personal point of view. It is equally clear, however, that such expressions after a lawyer has been nominated to judicial office shed little, if any, light on his capacity for judicial service. Indeed, to the extent that such statements seek to enhance the

popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for the office. [\*799]

Of course, any judge who faces reelection may believe that he retains his office only so long as his decisions are popular. Nevertheless, the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls. n2 He may make [\*\*720] common law, [\*\*2548] but judged on the merits of individual cases, not as a mandate from the voters.

n2 The Court largely ignores the fact that judicial elections are not limited to races for the highest court in the State. Even if announcing one's views in the context of a campaign for the State Supreme Court might be permissible, the same statements are surely less appropriate when one is running for an intermediate or trial court judgeship. Such statements not only display a misunderstanding of the judicial role, but they also mislead the voters by giving them the false impression that a candidate for the trial court will be able to and should decide cases based on his personal views rather than precedent.

Indeed, the Court's entire analysis has a hypothetical quality to it that stems, in part, from the fact that no candidate has yet been sanctioned for violating the announce clause. The one complaint filed against petitioner George Wersal for campaign materials during his 1996 election run was dismissed by the Board. App. 16-21. Moreover, when Wersal sought an advisory opinion during his 1998 campaign, the Board could not evaluate his request because he had "not specified what statement [he] would make that may or may not be a view on a disputed, legal or political issue." *Id.*, at 32. Since Wersal failed to provide examples of statements he wished to make, and because the Board had its own doubts about the constitutionality of the announce clause, it advised Wersal that "unless the speech at issue violates other prohibitions listed in Canon 5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable." *Ibid.* Consequently, the Court is left to decide a question of great constitutional importance in a case in which the petitioner's statements were

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either not subject to the prohibition in question, or he neglected to supply any concrete examples of statements he wished to make, and the Board refused to enforce the prohibition because of its own constitutional concerns.

By recognizing a conflict between the demands of electoral politics and the distinct characteristics of the judiciary, we [\*800] do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes. As a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency. In the absence of reliable evidence one way or the other, a State may reasonably presume that elected judges are motivated by the highest aspirations of their office. But we do know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: "Vote for me because I believe X, and I will judge cases accordingly." Once elected, he may feel free to disregard his campaign statements, *ante*, at 14, but that does not change the fact that the judge announced his position on an issue likely to come before him *as a reason to vote for him*. Minnesota has a compelling interest in sanctioning such statements.

A candidate for judicial office who goes beyond the expression of "general observation about the law . . . in order to obtain favorable consideration" of his candidacy, *Laird v. Tatum*, 409 U.S. 824, 836, n. 5, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972) (memorandum of REHNQUIST, J., on motion for recusal), demonstrates either a lack of impartiality or a lack of understanding of the importance of maintaining public confidence in the impartiality of the judiciary. It is only by failing to recognize the distinction, clearly stated by then-JUSTICE REHNQUIST, between statements made during a campaign or confirmation hearing and those made before announcing one's candidacy, that the Court is able to conclude: "Since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either," *ante*, at 23.

\*\*\*721] Even when "impartiality" is defined in its narrowest sense to embrace only "the lack of bias for or against either party to the proceeding," *ante*, at 19, the announce clause serves that interest. Expressions that stress a candidate's unbroken [\*801] record of affirming convictions for rape, n3 for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases). Contrary to the Court's reasoning in its first attempt to define impartiality, *ante*, at 9-10, an interpretation of the

announce clause that prohibits such statements serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality.

n3 See *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 226 (CA7 1993).

When the Court evaluates the importance of impartiality in its broadest sense, which it describes as "the interest in openmindedness, or at least in the appearance of openmindedness," *ante*, at 24, it concludes that the announce clause is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Ante*, at 26. It is underinclusive, in the Court's view, because campaign statements are an infinitesimal portion of the public commitments to legal positions that candidates make during their professional careers. It is not, however, the number of legal views that a candidate may have formed or discussed in his prior career that is significant. Rather, it is the ability both to reevaluate them in the light of an adversarial presentation, and to apply the governing rule of law even when inconsistent with those views, that characterize judicial openmindedness.

The Court boldly asserts that respondents have failed to carry their burden of [\*2549] demonstrating "that campaign statements are uniquely destructive of openmindedness," *ante*, at 28. But the very purpose of most statements prohibited by the announce clause is to convey the message that the candidate's mind is not open on a particular issue. The lawyer who writes an article advocating harsher penalties for polluters surely does not commit to that position to the same degree as the candidate who says "vote for me because I believe all polluters deserve harsher penalties." At the [\*802] very least, such statements obscure the appearance of openmindedness. More importantly, like the reasoning in the Court's opinion, they create the false impression that the standards for the election of political candidates apply equally to candidates for judicial office. n4

n4 JUSTICE KENNEDY would go even further and hold that no content-based restriction of a judicial candidate's speech is permitted under the First Amendment. *Ante*, at 1-2 (concurring opinion). While he does not say so explicitly, this extreme position would preclude even Minnesota's prohibition against "pledges or promises" by a candidate for judicial office. Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). A candidate could say "vote for me because I promise to never reverse a rape

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conviction," and the Board could do nothing to formally sanction that candidate. The unwisdom of this proposal illustrates why the same standards should not apply to speech in campaigns for judicial and legislative office.

The Court seems to have forgotten its prior evaluation of the importance of maintaining public confidence in the "disinterestedness" of the judiciary. Commenting on the danger [\*\*\*722] that participation by judges in a political assignment might erode that public confidence, we wrote: "While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Mistretta v. United States*, 488 U.S. 361, 407, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989).

Conversely, the judicial reputation for impartiality and openmindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office. As an elected judge recently noted:

"Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an [\*803] important role in maintaining judicial accountability. However, attacking courts and judges -- not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment -- maligns one of the basic tenets of judicial independence -- intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions. What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government. Judges should not have 'political constituencies.' Rather, a judge's fidelity must be to enforcement of the rule of law regardless of perceived popular will." De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 *Williamette L. Rev.* 367, 387 (2002).

The disposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided. I therefore respectfully dissent.

[\*\*2550] JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judges represent the Law." *Chisom v. Roemer*, 501 U.S. 380, 411, 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991) (SCALIA, J., dissenting). Unlike their counterparts in the political branches, judges are expected to [\*804] refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 266, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995) (STEVENS, J., dissenting), neutrally applying legal principles, and, [\*\*\*723] when necessary, "standing up to what is generally supreme in a democracy: the popular will," Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175, 1180 (1989).

A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," *United States v. Will*, 449 U.S. 200, 217, 66 L. Ed. 2d 392, 101 S. Ct. 471 (1980), an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943). "Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist* No. 78, p. 466 (C. Rossiter ed. 1961).

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers of the Federal Constitution sought to advance the judicial function through the structural protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate, generally for lifetime terms. Through its own Constitution, Minnesota, in common with most other States, has decided to allow its citizens to choose judges directly in periodic elections. But Minnesota has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means. Recognizing that the influence of political parties is incompatible with the judge's role, for example, Minnesota [\*805] has designated all judicial elections nonpartisan. See *Peterson v. Stafford*, 490 N.W.2d 418,

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425 (Minn. 1992). And it has adopted a provision, here called the Announce Clause, designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 881-882 (CA8 2001).

The question this case presents is whether the First Amendment stops Minnesota from furthering its interest in judicial integrity through this precisely targeted speech restriction.

## I

The speech restriction must fail, in the Court's view, because an electoral process is at stake; if Minnesota opts to elect its judges, the Court asserts, the State may not rein in what candidates may say. See *ante*, at 15-16 (notion that "right to speak out on disputed issues" may be abridged in an election context "sets our First Amendment jurisprudence on its head"); *ante*, at 29 (power to dispense with elections does not include power to curtail candidate speech if State leaves election process in place); 247 F.3d at 897 (Beam, J., dissenting) ("When a state opts to hold an election, [\*\*2551] it must commit itself to a complete election, replete with free speech and association."); *id.*, 247 F.3d at 903 (same).

I do not agree with this unilocular, "an election is an election," approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, [\*\*\*724] from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative [\*806] role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections, they are "at the core of our electoral process," *Williams v. Rhodes*, 393 U.S. 23, 32, 21 L. Ed. 2d 24, 89 S. Ct. 5, 45 Ohio Op. 2d 236 (1968), for they "enhance the accountability of government officials to the people whom they represent," *Brown v. Hartlage*, 456 U.S. 45, 55, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982).

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. "It is the business of judges to be indifferent to popularity." *Chisom*, 501 U.S. at 401, n. 29 (internal quotation marks omitted). They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants. Rehnquist, Dedicatory Address: Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 229-300 (1980). Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public. See *Barnette*, 319 U.S. at 638 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

Thus, the rationale underlying unconstrained speech in elections for political office -- that representative government depends on the public's ability to choose agents who will act at its behest -- does not carry over to campaigns for the bench. As to persons aiming to occupy the seat of judgment, the Court's unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place. *E.g.*, *ante*, at 16 (quoting *Wood v. Georgia*, [\*807] 370 U.S. 375, 395, 8 L. Ed. 2d 569, 82 S. Ct. 1364 (1962) ("*The role that elected officials play in our society* makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." (Emphasis added.))). See O'Neil, The Canons in the Courts: Recent First Amendment Rulings, 35 Ind. L. Rev. 701, 717 (2002) (reliance on cases involving nonjudicial campaigns, particularly *Brown v. Hartlage*, is "grievously misplaced"; "how any thoughtful judge could derive from that ruling any possible guidance for cases that involve judicial campaign speech seems baffling"). In view of the magisterial role judges must fill in a system of [\*\*\*725] justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office. See *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (CA7 1993) ("Mode of appointment is only one factor that enables distinctions to be made among different [\*\*2552] kinds of public official. Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").

The Court sees in this conclusion, and in the Announce Clause that embraces it, "an obvious tension," *ante*, at 37: The Minnesota electorate is permitted to select its judges by popular vote, but is not provided

information on "subjects of interest to the voters," *ibid.* -- in particular, the voters are not told how the candidate would decide controversial cases or issues if elected. This supposed tension, however, rests on the false premise that by departing from the federal model with respect to who *chooses* judges, Minnesota necessarily departed from the federal position on the *criteria* relevant to the exercise of that choice. n1

n1 In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be "of interest" to the President and the Senate in the exercise of their respective nomination and confirmation powers, just as information of that type would "interest" a Minnesota voter. But in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well. See Brief for Respondents 17-42 (collecting statements at Senate confirmation hearings). Surely the Court perceives no tension here; the line each of us drew in response to preconfirmation questioning, the Court would no doubt agree, is crucial to the health of the Federal Judiciary. But by the Court's reasoning, the reticence of prospective and current federal judicial nominees dishonors Article II, for it deprives the President and the Senate of information that might aid or advance the decision to nominate or confirm. The point is not, of course, that this "practice of voluntarily demurring" by itself "establishes the legitimacy of legal compulsion to demur," *ante*, at 18, n. 11 (emphasis omitted). The federal norm simply illustrates that, contrary to the Court's suggestion, there is nothing inherently incongruous in depriving those charged with choosing judges of certain information they might desire during the selection process.

[\*808]

The Minnesota Supreme Court thought otherwise:

"The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *Peterson*, 490 N.W.2d at 420.

Nothing in the Court's opinion convincingly explains why Minnesota may not pursue that goal in the manner it did.

Minnesota did not choose a judicial selection system with all the trappings of legislative and executive races. While providing for public participation, it tailored judicial selection to fit the character of third branch office holding. See *id.*, at 425 (Minnesota's system "keeps the ultimate choice with the voters while, at the same time, recognizing the unique independent nature of the judicial function."). The balance [\*\*\*726] the State sought to achieve -- allowing the people to elect judges, but safeguarding the process so that the integrity of the judiciary would not be compromised -- should encounter [\*809] no First Amendment shoal. See generally O'Neil, *The Canons in the Courts*, *supra*, at 715-723.

## II

Proper resolution of this case requires correction of the Court's distorted construction of the provision before us for review. According to the Court, the Announce Clause "prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions -- and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*." *Ante*, at 7. In two key respects, that construction misrepresents the meaning of the Announce [\*\*2553] Clause as interpreted by the Eighth Circuit and embraced by the Minnesota Supreme Court, *In re Code of Judicial Conduct*, 639 N.W.2d 55 (2002), which has the final word on this matter, see *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488, 49 L. Ed. 2d 1, 96 S. Ct. 2308 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State.").

First and most important, the Court ignores a crucial limiting construction placed on the Announce Clause by the courts below. The provision does not bar a candidate from generally "stating [her] views" on legal questions, *ante*, at 7; it prevents her from "publicly making known how [she] would *decide*" disputed issues, 247 F.3d at 881-882 (emphasis added). That limitation places beyond the scope of the Announce Clause a wide range of comments that may be highly informative to voters. Consistent with the Eighth Circuit's construction, such comments may include, for example, statements of historical fact ("As a prosecutor, I obtained 15 drunk driving convictions"); qualified statements ("Judges should use *sparingly* their discretion to grant lenient sentences to drunk drivers"); and statements framed [\*810] at a sufficient level of generality ("Drunk drivers are a threat to the safety of every driver"). What remains



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within the Announce Clause is the category of statements that essentially commit the candidate to a position on a specific issue, such as "I think all drunk drivers should receive the maximum sentence permitted by law." See Tr. of Oral Arg. 45 (candidate may not say "I'm going to decide this particular issue this way in the future").

Second, the Court misportrays the scope of the Clause as applied to a candidate's discussion of past decisions. Citing an apparent concession by respondents at argument, *id.*, at 33-34, the Court concludes that "statements critical of past judicial decisions are not permissible if the candidate also states that he is against *stare decisis*," *ante*, at 5-6 (emphasis omitted). That conclusion, however, draws no force from the meaning attributed to the Announce Clause by the Eighth Circuit. In line with the Minnesota Board on Judicial Standards, the Court of Appeals stated without qualification that the Clause "does not prohibit candidates from discussing [\*\*\*727] appellate court decisions." 247 F.3d at 882 (citing Minn. Bd. on Judicial Standards, Informal Opinion, Oct. 10, 1990, App. 55 ("In all election contests, a candidate for judicial office may discuss decisions and opinions of the Appellate Courts.")). The Eighth Circuit's controlling construction should not be modified by respondents' on the spot answers to fast-paced hypothetical questions at oral argument. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972) ("We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument.").

The Announce Clause is thus more tightly bounded, and campaigns conducted under that provision more robust, than the Court acknowledges. Judicial candidates in Minnesota may not only convey general information about themselves, see *ante*, at 7-8, they may also describe their conception of the role of a judge and their views on a wide range of subjects [\*811] of interest to the voters. See App. 97-103; Brief for Minnesota Bar Association as *Amicus Curiae* 22-23 (e.g., the criteria for deciding whether to depart from sentencing guidelines, the remedies for racial and gender bias, and the balance between "free speech rights [and] the need to control [hate crimes]"). Further, they may discuss, criticize, or defend past decisions of interest to voters. What candidates may not do -- simply or with sophistication -- is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, *sans* briefs, oral argument, and, [\*\*\*2554] as to an appellate bench, the benefit of one's colleagues' analyses. Properly construed, the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses.

The Court's characterization of the Announce Clause as "election-nullifying," *ante*, at 17, "placing most subjects of interest to the voters off limits," *ante*, at 21, is further belied by the facts of this case. In his 1996 bid for office, petitioner Gregory Wersal distributed literature sharply criticizing three Minnesota Supreme Court decisions. Of the court's holding in the first case -- that certain unrecorded confessions must be suppressed -- Wersal asked, "Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" App. 37. Of the second case, invalidating a state welfare law, Wersal stated: "The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies." *Ibid.* And of the third case, a decision involving abortion rights, Wersal charged that the court's holding was "directly contrary to the opinion of the U.S. Supreme Court," "unprecedented," and a "pro-abortion stance." *Id.*, at 38.

When a complaint was filed against Wersal on the basis of those statements, *id.*, at 12-15, the Lawyers Professional Responsibility Board concluded that no discipline was warranted, [\*812] in part because it thought the disputed campaign materials did not violate the Announce Clause, *id.*, at 20-21. And when, at [\*\*\*728] the outset of his 1998 campaign, Wersal sought to avoid the possibility of sanction for future statements, he pursued the option, available to all Minnesota judicial candidates, Tr. of Oral Arg. 12-13, of requesting an advisory opinion concerning the application of the Announce Clause. App. 24-26. In response to that request, the Board indicated that it did not anticipate any adverse action against him. *Id.*, at 31-33. n2 Wersal has thus never been sanctioned under the Announce Clause for any campaign statement he made. On the facts before us, in sum, the Announce Clause has hardly stifled the robust communication of ideas and views from judicial candidate to voter.

n2 In deciding not to sanction Wersal for his campaign statements, and again in responding to his inquiry about the application of the Announce Clause, the Board expressed "doubts about the constitutionality of the current Minnesota Canon." App. 20; *id.*, at 32. Those doubts, however, concerned the meaning of the Announce Clause before the Eighth Circuit applied, and the Minnesota Supreme Court adopted, the limiting constructions that now define that provision's scope.



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Even as it exaggerates the reach of the Announce Clause, the Court ignores the significance of that provision to the integrated system of judicial campaign regulation Minnesota has developed. Coupled with the Announce Clause in Minnesota's Code of Judicial Conduct is a provision that prohibits candidates from "making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). Although the Court is correct that this "pledges or promises" provision is not directly at issue in this case, see *ante*, at 4, the Court errs in overlooking the interdependence of that prohibition and the one before us. In my view, the constitutionality of the Announce [\*813] Clause cannot be resolved without an examination of that interaction in light of the interests the pledges or promises provision serves.

A

All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results. See Brief for Petitioners Republican Party of Minnesota et al. [\*\*2555] 36-37; Tr. of Oral Arg. 14-16 (petitioners' acknowledgment that candidates may be barred from making a "pledge or promise of an outcome"); Brief for Respondents 11; see also Brief for Brennan Center for Justice et al. as *Amici Curiae* 23 ("All of the parties and *amici* in this case agree that judges should not make explicit promises or commitments to decide particular cases in a particular manner.").

The reasons for this agreement are apparent. Pledges or promises of conduct in office, however commonplace in races for the political branches, are inconsistent "with the judge's obligation to decide cases in accordance with his or her role." Tr. of Oral Arg. 16; see Brief for Petitioners Republican Party of Minnesota et al. 36 ("Because [judges] have a duty to decide a case on the basis of the law and facts before them, they can be prohibited, as candidates, from making such promises."). This judicial obligation to avoid prejudgment corresponds to the litigant's [\*\*\*729] right, protected by the Due Process Clause of the Fourteenth Amendment, to "an impartial and disinterested tribunal in both civil and criminal cases," *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980). The proscription against pledges or promises thus represents an accommodation of "constitutionally protected interests [that] lie on both sides of the legal equation." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000) (BREYER, J., concurring). Balanced against the candidate's interest in free expression is the litigant's "powerful and independent constitutional interest in fair

adjudicative procedure." *Marshall*, 446 U.S. at 243; see *Buckley*, 997 F.2d [\*814] at 227 ("Two principles are in conflict and must, to the extent possible, be reconciled. . . . The roots of both principles lie deep in our constitutional heritage.").

The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: "No man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955). Our cases have "jealously guarded" that basic concept, for it "ensures that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall*, 446 U.S. at 242.

Applying this principle in *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927), we held that due process was violated where a judge received a portion of the fines collected from defendants whom he found guilty. Such an arrangement, we said, gave the judge a "direct, personal, substantial[, and] pecuniary interest" in reaching a particular outcome and thereby denied the defendant his right to an impartial arbiter. *Id.*, at 523. *Ward v. Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), extended *Tumey*'s reasoning, holding that due process was similarly violated where fines collected from guilty defendants constituted a large part of a village's finances, for which the judge, who also served as the village mayor, was responsible. Even though the mayor did not personally share in those fines, we concluded, he "perforce occupied two practically and seriously inconsistent positions, one partisan and the other judicial." 409 U.S. at 60 (internal quotation marks omitted).

We applied the principle of *Tumey* and *Ward* most recently in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986). That decision invalidated a ruling of the Alabama Supreme Court written by a justice who had a personal interest in the resolution of a dispositive issue. The Alabama Supreme Court's ruling was issued while the justice was pursuing a separate lawsuit in an Alabama lower court, and its outcome "had the clear and immediate effect of enhancing both the legal status [\*815] and the settlement value" [\*\*2556] of that separate suit. *Id.*, at 824. As in *Ward* and *Tumey*, we held, the justice therefore had an interest in the outcome of the decision that unsuited him to participate in the judgment. 475 U.S. at 824. It mattered not whether the justice was actually influenced by this interest; [\*\*\*730] "the Due Process Clause," we observed, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally

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between contending parties." *Id.*, at 825 (internal quotation marks omitted).

These cases establish three propositions important to this dispute. First, a litigant is deprived of due process where the judge who hears his case has a "direct, personal, substantial, and pecuniary" interest in ruling against him. *Id.*, at 824 (internal quotation marks and alteration omitted). Second, this interest need not be as direct as it was in *Tumey*, where the judge was essentially compensated for each conviction he obtained; the interest may stem, as in *Ward*, from the judge's knowledge that his success and tenure in office depend on certain outcomes. "The test," we have said, "is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear, and true.'" *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). And third, due process does not require a showing that the judge is actually biased as a result of his self-interest. Rather, our cases have "always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. "The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532. n3

n3 To avoid the import of our due process decisions, the Court dissects the concept of judicial "impartiality," *ante*, at 9-13, concluding that only one variant of that concept -- lack of prejudice against a *party* -- is secured by the Fourteenth Amendment, *ante*, at 9-10. Our Due Process Clause cases do not focus solely on bias against a particular party, but rather inquire more broadly into whether the surrounding circumstances and incentives compromise the judge's ability faithfully to discharge her assigned duties. See *supra*, at 13. To be sure, due process violations may arise where a judge has been so personally "enmeshed in matters" concerning one party that he is biased against him. See *Johnson v. Mississippi*, 403 U.S. 212, 215, 29 L. Ed. 2d 423, 91 S. Ct. 1778 (1971) (*per curiam*) (judge had been "a defendant in one of petitioner's civil rights suits and a losing party at that"). They may also arise, however, not because of any predisposition toward a party, but rather because of the judge's personal interest in resolving an issue a certain way. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986). Due process will not countenance the latter situation, even though the self-interested judge "will apply the law to [the

losing party] in the same way he [would apply] it to any other party" advancing the same position, *ante*, at 9.

[\*816]

The justification for the pledges or promises prohibition follows from these principles. When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest. If successful in her bid for office, the judicial candidate will become a judge, and in that capacity she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail. If the judge fails to honor her campaign promises, she will not only face abandonment by supporters of her professed views, she will also "risk being assailed as a dissembler," 247 F.3d at 878, willing to [\*\*\*731] say one thing to win an election and to do the opposite once in office.

A judge in this position therefore may be thought to have a "direct, personal, substantial, [and] pecuniary interest" in ruling against certain litigants, *Tumey*, 273 U.S. at 523, for she may be voted off the bench and thereby lose her salary and emoluments unless she honors [\*\*2557] the pledge that secured her election. See Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059, 1083-1092 (1996); see *id.*, at 1088 ("[A] campaign promise [may be characterized as] a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment [\*817] as a judge."); see also The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) ("In the general course of human nature, a power over a man's subsistence amounts to a power over his will." (emphasis deleted)).

Given this grave danger to litigants from judicial campaign promises, States are justified in barring expression of such commitments, for they typify the "situation . . . in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). By removing this source of "possible temptation" for a judge to rule on the basis of self-interest, *Tumey*, 273 U.S. at 532, the pledges or promises prohibition furthers the State's "compelling interest in maintaining a judiciary fully capable of performing" its appointed task, *Gregory v. Ashcroft*, 501 U.S. 452, 472, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991): "judging [each] particular controversy fairly on the basis of its own circumstances," *United States v. Morgan*, 313 U.S. 409, 421, 85 L. Ed. 1429, 61 S. Ct. 999 (1941). See O'Neil, The Canons in the Courts, *supra*, at 723 ("What is at stake here is no less than the promise of fairness, impartiality, and

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ultimately of due process for those whose lives and fortunes depend upon judges being selected by means that are not fully subject to the vagaries of American politics.").

In addition to protecting litigants' due process rights, the parties in this case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary. See Tr. of Oral Arg. 16 (petitioners' statement that pledges or promises properly fosters "public perception of the impartiality of the judiciary"). See *Cox v. Louisiana*, 379 U.S. 559, 565, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public."); *In re Murchison*, 349 U.S. at 136 ("To perform its high function in the best way[,] 'justice must satisfy the appearance of justice.'" (quoting *Offutt v. United States*, 348 U.S. 11, 14, 99 L. Ed. 11, 75 S. Ct. 11 (1954))). Because courts control [\*818] neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe. See *Mistretta v. United States*, 488 U.S. 361, 407, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). As the Minnesota Supreme Court has recognized, all [\*\*\*732] legal systems -- regardless of their method of judicial selection -- "can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions." *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (1984).

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo* -- a judicial candidate's promises on issues in return for the electorate's votes at the polls -- inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest. n4 [\*\*2558] Then-JUSTICE REHNQUIST's observations [\*819] about the federal system apply with equal if not greater force in the context of Minnesota's elective judiciary: Regarding the appearance of judicial integrity,

"[one must] distinguish quite sharply between a public statement made prior to

nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird v. Tatum*, 409 U.S. 824, 836, n. 5, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972) (memorandum opinion).

n4 The author of the Court's opinion declined on precisely these grounds to tell the Senate whether he would overrule a particular case:

"Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter." 13 R. Mersky & J. Jacobstein, *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1986*, 131 (1989) (hearings before the Senate Judiciary Committee on the nomination of then-Judge Scalia).

## B

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges. The Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.

Uncoupled from the Announce Clause, the ban on pledges or [\*\*\*733] promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would

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decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate [\*820] who campaigns by saying, "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages," *ante*, at 14, will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: "I think it is constitutional for the legislature to prohibit same-sex marriages," *ante*, at 13. Made during a campaign, both statements contemplate a *quid pro quo* between candidate and voter. Both effectively "bind [the candidate] to maintain that position after election." *Ante*, at 4. And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, see *ante*, at 14-15, the "nonpromissory" statement averts none of the dangers posed by the "promissory" one. (Emphasis omitted).

By targeting statements that do not technically constitute pledges or promises but nevertheless "publicly make known how [the candidate] would decide" legal issues, 247 F.3d at 881-882, the Announce Clause prevents this end run around the letter and spirit of its companion provision. n5 No less than the pledges or promises [\*\*2559] clause itself, the Announce [\*821] Clause is an indispensable part of Minnesota's effort to maintain the health of its judiciary, and is therefore constitutional for the same reasons.

n5 In the absence of the Announce Clause, other components of the Minnesota Code of Judicial Conduct designed to maintain the nonpartisan character of the State's judicial elections would similarly unravel. A candidate would have no need to "attend political gatherings" or "make speeches on behalf of a political organization," Minn. Code of Judicial Conduct, Canon 5(A)(1)(c), (d), for she could simply state her views elsewhere, counting on her supporters to carry those views to the party faithful. And although candidates would remain barred from "seeking, accept[ing,] or using endorsements from a political organization," Canon 5(A)(1)(d), parties might well provide such endorsements unsolicited upon hearing candidates' views on specific issues. Cf. *ante*, at 3 (Minnesota Republican Party sought to learn Wersal's views so Party could support or oppose his candidacy). Those unsolicited endorsements, in turn, would render ineffective the prohibition against candidates "identifying themselves as members of a political organization," Canon 5(A)(1)(a). "Indeed, it is not too much to say that

the entire fabric of Minnesota's nonpartisan elections hangs by the Announce clause thread." Brief for Minnesota State Bar Association as *Amicus Curiae* 20.

\* \* \*

This Court has recognized in the past, as JUSTICE O'CONNOR does today, see *ante*, at 1-3 (concurring opinion), a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. We have no warrant to resolve that tension, however, by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment [\*\*\*734] does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States who wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. P. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 86 (1990); Brief for the Conference of Chief Justices as *Amicus Curiae* 5. The Announce Clause, borne of this long effort, "comes to this Court bearing a weighty title of respect," *Teamsters v. Hanke*, 339 U.S. 470, 475, 94 L. Ed. 995, 70 S. Ct. 773, 57 Ohio L. Abs. 330 (1950). I would uphold it as an essential component in Minnesota's accommodation of the complex and competing concerns in this sensitive area. Accordingly, I would affirm the judgment of the Court of Appeals for the Eighth Circuit.

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